LOH SEK NGEE v. PUBLIC PROSECUTOR.

[Court of Appeal (Mathew, C.J., Pretheroe and Wilson, JJ.) Kuala Lumpur, February 4, 1952]

Emergency Regulations, 1948 — Regulation 4(1)(a) and (b) — Carrying arms — Sentence of death — Right of appeal.

The appellant in this case was convicted, on his own plea, of three offences, (1) carrying a revolver contrary to Regulation 4(1) (a) of the Emergency Regulations, (2) possession of six rounds of ammunition contrary to Regulation 4(1)(b), and (3) possession of a hand grenade contrary to Regulation 4(1)(b). The learned trial Judge sentenced the accused to death on the first charge and deferred sentence on the other two charges. The point for determination was whether the appellant had a right of appeal to the Court of Appeal.

Held, that a convicted person has a right of appeal to the Court of Appeal against sentence even though the only sentence provided by law is death.

CRIMINAL APPEAL.

The Judgment of the Court of Appeal was delivered by :—

Mathew, C.J. : — The appellant in this case was convicted, on his own plea, of three offences, (1) carrying a revolver contrary to Regulation 4(1) (a) of the Emergency Regulations, (2) possession of six rounds of ammunition contrary to Regulation 4(1) (b), and (3) possession of hand grenade contrary to Regulation 4(1) (b). The learned trial Judge sentenced the accused to death on the first charge and deferred sentence on the other two charges. The first point for determination is whether the appellant has a right of appeal to this Court.

Regulation 12 of the Emergency (Criminal Trials) Regulations, 1948, requires the presiding Judge, immediately after passing sentence in an Emergency Procedure case, to ask the convicted person if he wishes to appeal against his conviction or sentence or both, and a note of a reply to such question shall be entered in and form part of the record. Under the proviso to this regulation this procedure shall not be followed in a case where no sentence other than death is provided by law and the accused has been convicted on his own plea. This regulation is purely procedural and in no way affects the rights of a convicted person to appeal. There are no other relevant provisions regarding appeals in Emergency Procedure cases, and appeals in such cases are therefore governed by section 19 of the Courts Ordinance (No. 43 of 1948). Sub-section (2) of this section provides :—

"An appeal by a person convicted shall be either against the conviction or against the sentence or against both:

Provided that where an accused person has pleaded guilty and been convicted on such plea there shall be no appeal except as to the extent or legality of the sentence."

In our view a convicted person has a right of appeal to the Court of Appeal against sentence even though the only sentence provided by law is death. The appellant in this case has urged in mitigation of sentence that he had assisted the Police after his arrest. These are matters which it is not competent for us to consider. The only sentence provided by law for an offence contrary to Regulation 4(1) (a) of the Emergency Regulations is death.

The appeal against sentence is dismissed.

Appeal dismissed.

PUBLIC PROSECUTOR v. GOH THOR KIAH.

[App. Crim. Juris. (Taylor, J.) February 22, 1952]

[Selangor — Criminal Appeal No. 69 of 1951]

Criminal Procedure Code (Cap. 6). s. 314 — The word "shall" appearing in s. 314(ii) — Construction of.

This was an appeal by the Public Prosecutor. The respondent in this case was charged in the Sessions Court with possession of some 20 packets of opium. He pleaded guilty and was discharged under section 173A of the Criminal Procedure Code. When the appeal first came before Taylor, J., no notice of any kind that an appeal was pending had been served on the respondent. The Public Prosecutor applied under section 314(ii) for a notice to be issued; this was done and it was returned unserved. Section 314(ii) reads:

"(ii) If the service of such last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence."

The learned Deputy Public Prosecutor applied under the above sub-section for the appeal to be heard on the merits in the absence of the respondent.

Held, that originally there was no appeal by the Public Prosecutor; the Chapter was framed on the view that he would be the respondent and provision is made for the record to be transmitted to him by way of service but without being actually served. Much later, the Code was amended to permit of an appeal on the merits by the Public Prosecutor but section 314 was not amended; therefore an appeal by the Public Prosecutor cannot be heard in the absence of the respondent.

The word "shall" is construed with a qualification to avoid infringing a fundamental principle.

CRIMINAL APPEAL.

D. M. K. Grant (D.P.P.) for the appellant.

Respondent — absent, unserved.

Cur. Adv. Vult.

Taylor, J. : — This is an appeal by the Public Prosecutor against a sentence or order which he says was inadequate.

The accused was charged in the Sessions Court with possession of some twenty packets of opium. He pleaded

guilty and was discharged under section 173A of the Criminal Procedure Code. When the appeal first came before me, no notice of any kind that an appeal was pending had been served on the respondent. The Public Prosecutor applied under section 314(i) for a notice to be issued; this was done and it has been returned unserved. Section 314(ii) reads :—

"(ii) If the service of such last-mentioned notice cannot be effected on the respondent the Court shall proceed to hear the appeal in his absence."

The learned Deputy now applies under this sub-section for the appeal to be heard on the merits in the absence of the respondent and suggests that a more severe sentence should be passed and a warrant issued to enforce it. It is admitted that his construction is surprising in that it involves the proposition that a person who has been acquitted in one of the lower Courts might have his acquittal reversed and a conviction substituted and sentence passed and that he might be arrested and imprisoned without having any further opportunity whatsoever to present his side of the case. Such a construction is a plain violation of the fundamental principle *audi alterem partem* and in my view is wholly opposed to all our principles of judicial procedure.

I think the explanation of the section is this. Originally there was no appeal by the Public Prosecutor; the chapter was framed on the view that he would be the respondent and provision is made for the record to be transmitted to him by way of service but without being actually served. Much later, the Code was amended to permit of an appeal on the merits by the Public Prosecutor but section 314 was not amended. I agree that it is a strong thing to construe the word "shall" as "may" but I do not go as far as that. In my opinion, having regard to what I believe to be the history of the section, the true construction is : " 'shall' if the prosecutor is the respondent." I do not think that the word "shall", in a procedural statute, could be construed as strictly as is here contended if the consequence is violation of a fundamental principle; I think that on the true principles of construction of statutes the word "shall" must be given a meaning modified to the extent which I have indicated.

The section might also have application where an appeal was brought by a private prosecutor in a private summons case in which the Public Prosecutor's Department had not taken part. In such a case I think it would be quite proper and reasonable for an appeal by a convicted person to be heard by the Court in the absence of the respondent. I would remark that in the Court of Criminal Appeal in England it is not unusual of an appeal by a prisoner to be heard without any counsel appearing for the prosecution. The position there is slightly different because the Attorney-General does not control prosecutions generally throughout England nor does the Director of Public Prosecutions. Many prosecutions are in charge of County and other local officials who may instruct counsel to prosecute at Quarter Sessions or elsewhere but, having secured a conviction, they may be content to leave the matter of an appeal entirely in the hands of the Court and not incur the trouble and expense of briefing London counsel to represent them there.

There is another ground of principle which I think supports my construction of the sub-section. The Court does not make orders which appear likely to be abortive. Apart from the incongruity of sentencing a man without his having had the opportunity to be heard, it would be futile to pass a sentence without a fair prospect of it ever being enforced.

The Code does not make express provision for the situation which has arisen in the present case but I think that it is within the power of the Court to issue a warrant of arrest in such circumstances, and if counsel for the Public Prosecutor were to apply for a Bench warrant with a view to the apprehension of this respondent, so that the appeal could be heard and an effective order made, then I would consider the application.

The hearing of this appeal cannot proceed but it is not dismissed and may be adjourned to a date to be fixed by the Registrar.

Order accordingly.

S. R. M. RAMAN CHETTIAR v. SOH BEK NEO & ANOR.

[Orig. Civ. Juris. (Abbott, J.) March 5, 1952]

[Malacca — Originating Summons No. 106 of 1949]

Debtor and Creditor (Occupation Period) Ordinance 1948 s. 11(3) — Notice to debtor to reinstate or replace the charge — Meaning of "not less than one month".

The principal question raised in this case was whether the notice given by the plaintiff to the defendant requiring him to reinstate or replace the security was a valid notice under section 11(3) of the Debtor and Creditor (Occupation Period) Ordinance 1948. Section 11(3) of the Ordinance provides that where the rights of a creditor in relation to any charge have been deemed by virtue of sub-section (1) of section 11, not to have been extinguished, the creditor may give notice in writing of not less than one month calling upon the debtor to reinstate or replace the charge. In this case the defendant who was the debtor was required by the notice to reinstate